

San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

August 5, 2022

TO: Commission Members

FROM: Enforcement Committee Members

SUBJECT: Enforcement Committee's Recommended Enforcement Decision and Proposed Agreement in ER2019.026, Addressing Middle Harbor Shoreline Park
(For Commission consideration on August 18, 2022)

Summary

The Enforcement Committee recommends that the Commission that the Commission authorize the Executive Director to resolve ER2019.026.00 by executing a settlement agreement with the Port of Oakland addressing Middle Harbor Shoreline Park. On July 14, 2022, the Committee voted 4-0-0 to adopt the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission. The Executive Director's Recommended Enforcement Decision, the proposed Agreement, and its exhibits are attached to this recommendation.



Full Commission Motion and Action:

Please check one of the four boxes indicating your decision, then sign and return the memorandum to BCDC Staff:

- ☐ By a vote of ___ yeses, ___ noes, and ___ abstentions, the Commission concurs with the Enforcement Committee's Recommended Enforcement Decision and issues the proposed Cease and Desist and Civil Penalty Order.
- ☐ By a vote of ___ yeses, ___ noes, and ___ abstentions, the Commission votes to dismiss this matter and declines to issue the proposed Cease and Desist and Civil Penalty Order for the reasons specified in the attached memorandum.
- ☐ By a vote of ___ yeses, ___ noes, and ___ abstentions, the Commission votes to remand the matter back to the Enforcement Committee for further action for the reasons specified in the attached memorandum.
- ☐ By a vote of ___ yeses, ___ noes, and ___ abstentions, the Commission rejects the Enforcement Committee's Recommended Enforcement Decision and decides to consider the entire matter de novo at the Commission meeting on _____.

Zachary Wasserman, Commission Chair
San Francisco Bay Conservation and Development Commission

Date:

San Francisco Bay Conservation and Development Commission

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July 1, 2022

TO: Enforcement Committee Members

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Brent Plater, Enforcement Attorney (415/352-3628; brent.plater@bcdc.ca.gov)

SUBJECT: **Executive Director's Recommended Enforcement Decision and Proposed Agreement in ER2019.026.00, Addressing Middle Harbor Shoreline Park** (For Commission consideration on August 18, 2022)

Summary

BCDC staff have negotiated a proposed agreement (hereinafter “the Agreement”) with the Port of Oakland (hereinafter “the Port”) to resolve ER2019.026.00, which identifies multiple violations of BCDC Permit 1999.007.09 (hereinafter “the Permit”) at Middle Harbor Shoreline Park (hereinafter the “Park”). The Port Board approved the Agreement on June 16, 2022. BCDC staff requests that the Enforcement Committee recommend that the Commission authorize the Executive Director to resolve ER2019.026.00 by executing the Agreement.

Background

The Port proposed the Park, along with the adjacent Middle Harbor Enhancement Area, in part to offset the extensive fill and extraction the Commission authorized as part of the Port’s “Vision 2000” expansion. However, neither the Park nor Middle Harbor Enhancement Area have performed as anticipated at the time of Commission authorization. BCDC staff opened ER2019.026.00 to address the Port’s violation of the Permit authorizing the Park, and ER2018.006.00 to address the Port’s and the U.S. Army Corps of Engineer’s violations at Middle Harbor Shoreline Park.

Since ER2019.026.00 was opened the Port has taken corrective action to address several Permit violations identified by BCDC. The Agreement would resolve this matter by requiring the Port to maintain these corrective actions; resolve other Permit violations through BCDC’s Plan Review process; update the Park’s Master Plan and Management Plan and submit them for BCDC review by December 31, 2022; obtain Permit amendments consistent with the updated Master Plan by May 1, 2023; and ensure BCDC approval is obtained before special events that close all or part of the Park occur. The Agreement also requires the Port to pay \$180,000 in civil administrative liability. ER2018.006.00 is not addressed by this Agreement and remains unresolved.



Admitted and Contested Allegations

BCDC staff identified nine violations of the Permit:

1. Failure to implement the Park Management Plan in violation of Permit Special Condition II.C.11.c;
2. Failure to maintain the public access area in violation of Permit Special Condition II.C.5;
3. Unauthorized partial closure of the Park's public access area known as Mole in violation of Permit Special Condition II.C.1;
4. Unauthorized partial closure of the public access area known as the Port View Park connection in violation of Permit Special Condition II.C.1;
5. Failure to provide all public access improvements (including disabled parking spaces, Phase III Improvements, and public access signage) in violation of Permit Special Condition II.C.4;
6. Failure to provide bicycle path and related improvements in violation of Permit Special Conditions II.C.8.a.3 and II.C.8.d;
7. Placement of an unauthorized portable restroom in violation of Cal. Gov't Code § 66632(a);
8. Failure to conduct BCDC Plan Review and receive approval for certain trail paving activities in violation of Permit Special Condition II.B; and
9. Hosting 25 special events that closed all or a portion of the Park to the public without prior BCDC approval in violation of Permit Special Condition II.C.1.

All nine violations have been resolved or are addressed by the Agreement. Most are addressed through Sections I and II of the Agreement, which create processes for updating the Park's Master and Management Plans, and Section V, which requires the Port to amend the Permit to construct and manage the Park consistent with plan updates. These sections identify specific areas of concern at the park to ensure they are addressed by the Port. Special event authorization is addressed in Section VI of the Agreement. Many of the maintenance issues have been corrected by the Port at the Park, and Section III of the Agreement requires the Port to maintain those corrections. Other maintenance issues, such as the failure to maintain landscaped lawns, are indicative of structural problems at the Park and addressed through the plan update processes. Section IV identifies violations that can be resolved through BCDC's Plan Review process and incorporates them into the process for amending the Permit.

Defenses and Mitigating Factors

Section VIII of the Agreement requires the Port to pay \$180,000 in civil penalties. BCDC staff calculated civil administrative liability pursuant to Cal. Gov't Code § 66641.9(a), and determined that ER2019.026.00 was eligible for a total penalty of \$234,750. The gravity, nature, and duration of the violations in this matter suggest maximum penalties should be assessed. However, in light of the costs to the State in pursuing formal enforcement of this matter, the Port's voluntary efforts to resolve some of the maintenance issues at the Park, and to encourage rapid resolution of long-standing problems at the Park BCDC staff recommend reducing civil liability to \$180,000. The Port has agreed to pay these penalties within 30 days of execution of the Agreement.

Staff Rebuttal

N/A.

Unresolved Issues

All issues in ER2019.026.00 are resolved by the Agreement. ER2018.006.00, which addresses violations at the Middle Harbor Enhancement Area, is not addressed by the Agreement and remains unresolved.

Previous Enforcement Actions

In addition to the related matter ER2018.006.00, the Executive Director issued ECD2019.001.00 on October 19, 2019, which addressed the Port's unauthorized closure of all or part of the Park to host fee-based special events. The issues addressed in that Order are also addressed in Section VI of the Agreement.

Recommendation

BCDC staff requests that the Enforcement Committee recommend that the Commission authorize the Executive Director to resolve ER2019.026.00 by executing the Agreement.

Proposed Agreement

The Agreement is attached as Exhibit A to this Recommended Enforcement Decision.

Attachments: Exhibit A: Proposed Agreement
Exhibit B: BCDC Permit 1999.007.09
Exhibit C: ECD2019.001.00

Enforcement Committee Recommendation to the Full Commission:

Please check one of the three boxes indicating your decision, then sign and return the memorandum to BCDC Staff:

☒ By a vote of ⁴__ yeses, ⁰__ noes, and ⁰__ abstentions, the Enforcement Committee adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission.

☐ By a vote of __ yeses, __ noes, and __ abstentions, the Enforcement Committee conditionally adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission as specified in the attached memorandum.

☐ By a vote of __ yeses, __ noes, and __ abstentions, the Enforcement Committee declines to adopt the Executive Director's Recommended Enforcement Decision and recommends that the full Commission decline to issue the proposed Cease and Desist and Civil Penalty Order for the reasons specified in the attached memorandum.

Marie Gilmore

Marie Gilmore, Chair

Enforcement Committee

San Francisco Bay Conservation and Development Commission

7/14/2022 | 1:21:56 PM PDT

Date: